

The Board writes this separate opinion not only because the parties declined to consolidate their appeals, but also because the issues raised by MCC require a distinct resolution and further explanation from the Board.

In *St. Joseph's II* the Board held that, even if we accepted St. Joseph's interpretation of the definition of "expanded use" as requiring a threshold finding that proposed improvements represent an enlargement of the existing use in order to require a special exception, the Board would in fact make that finding with regard to the matters listed in the Zoning Officer's determination.

To a certain extent, the Board's decision in *St. Joseph's II* renders MCC's appeal moot. The Board has already determined that St. Joseph's University must be granted a special exception before constructing the improvements identified in the Zoning Officer's September 16, 2008 letter. However, in the interests of judicial economy and to provide additional guidance to the parties as this matter proceeds in the future, the Board will address the claims in MCC's appeal.

Foremost among the claims is MCC's request that the Board adopt an interpretation of the definition of "expanded use" that is more restrictive of the one St. Joseph's proposed and the Board adopted for purposes of its decision in *St. Joseph's II*. MCC suggests that the list of circumstances in the definition are themselves instances that must be considered "expanded uses." Based on that interpretation, MCC also submitted a list of 13 items that it urges ought to be deemed "expanded uses" requiring St. Joseph's to obtain a special exception. [N.T. 100-103]

In addressing MCC's claims, the Board is guided by a number of well-settled rules of zoning ordinance interpretation, including those found in the Statutory

Construction Act. *Beers v. Zoning Hearing Board of Towamensing Township*, 933 A.2d 1067 (Pa. Cmwlth. 2007). Chief among those is that the plain language of the ordinance must be interpreted so as to give effect to the legislative intent. The Board is not free to disregard the plain language under the pretext of pursuing the spirit of the ordinance. And where an ambiguity exists, the ordinance must be interpreted in favor of the landowner. *Kleinman v. Lower Merion Township Zoning Hearing Board*, 916 A.2d 726 (Pa. Cmwlth. 2006); 53 P.S. §10603.1. In addition, the Board must look to the Zoning Ordinance as a whole as an aid in interpretation. *Camp Ramah in the Poconos v. Zoning Hearing Board of Worcester Township*, 743 A.2d 1019 (Pa. Cmwlth. 2000).

In this matter, the Board does not find there to be an ambiguity in the definition of "expanded use." We agree with St. Joseph's that there must be an enlargement of the use of the property, and not merely the occurrence of one of the circumstances listed in the definition, in order for there to be an "expanded use." If the BOC meant to trigger the expanded use regulation in any of the listed circumstances, it would not have included the first 13 words of the definition. They would be unnecessary and/or redundant. In interpreting a zoning ordinance provision, the Board must give effect to all the language in the provision. 1 Pa.C.S. §1922(2).

Consistent with this interpretation, the Board determined in *St. Joseph's II* that, examining the plan as a whole, the proposed improvements were an enlargement of the use that the Board had approved in *St. Joseph's I* – varsity athletics with no new building or construction. The new baseball field alone will require the installation of a stormwater management system, artificial turf, retaining walls, 35-foot high netting, dugouts, bleachers, a press box, and a permanent public address system. Whether any of these

improvements should individually be deemed an enlargement of the use described in *St. Joseph's I*, taken as a whole they undoubtedly evidence an enlargement of that use, requiring a special exception.

With respect to whether the items on Mr. Guttenplan's list could ever by themselves constitute an expanded use, the Board makes the following findings.

In the absence of an extraordinary circumstance, these items would not constitute an expanded use and MCC's appeal is denied insofar as these are concerned:

1. removing existing structures, and
2. installing steps and ramps.

These items have the potential to be expanded uses, depending on the facts of the specific application:

3. erecting retaining walls,
4. installing artificial turf,
5. erecting the 35-foot netting,
6. installing new playing fields,
7. installing a permanent public address system, and
8. erecting "structures" and "buildings" – dugouts, press boxes, bleachers.

As noted above, the Board has determined in *St. Joseph's II* that numbers 3-8 are expanded uses because the original approval for the use of the Maguire Campus was expressly without new building or construction – based on the representations made to the Board at the time.

MCC offered no testimony as to how certain other items on Mr. Guttenplan's list might constitute an expanded use and MCC's appeal is denied insofar as these items are concerned:

9. erecting the City Avenue wall, and
10. installing fences, bollards, lighting fixtures/poles,¹ and curbs.

¹ Interestingly, St. Joseph's counsel stated at the original hearings in *St. Joseph's I* that if the University ever proposed to put in new lighting, it would have to return to the Board for approval. [N.T. 10/27/05 at 78-79]

ORDER

AND NOW, this 26th day of March, 2009, it is hereby ORDERED that the appeal of Merion Community Coalition from the September 16, 2008 determination of the Lower Merion Zoning Officer is GRANTED in part and DENIED in part for the reasons set forth in the foregoing opinion.

Chairman Aaron and Member Fox participating, both voting "aye." Member Brier participated in the hearing, but did not vote on the decision in this matter.

Attest: _____
Michael Wylie
Secretary

On March 16, 2006, the Board granted the Appellant's application. [See *St. Joseph's University Appeal*, No. 4011 (March 16, 2006) ("*St. Joseph's I*"), reproduced by the Appellant as Exhibit A-4] Based on the intricate financial arrangements underlying the Appellant's purchase of the site from Episcopal Academy, the Board extended the expiration date for the approval to December 31, 2012.³ This allowed Episcopal to complete construction of its new campus with the assurance that the Appellant would close on the purchase of the Maguire Campus.

The Board's decision in *St. Joseph's I* approved the Appellant's uses of the existing buildings on the Maguire Campus for education, administration and maintenance, essentially the same uses that Episcopal had made of those buildings. The 14.5 acres of playing fields were allowed to continue to be used for varsity and intramural grass sports such as baseball, softball and soccer. The tennis courts were allowed to remain and to be used for NCAA Division I tennis matches. [*Id.* at pp. 3, 7-9]

The Board also granted the Appellant relief from the parking requirements for the Maguire Campus. After finding that 999 spaces were required and that only 319 existed, the Board waived the requirement for 499 spaces,⁴ found that 28 spaces could be added by re-striping an existing lot, and then granted a variance from the remaining 158 required spaces. [*Id.* at pp. 10-12]

The Board expressly based the grant of the special exception and variance on, and conditioned the grant of relief on Appellant's adherence to, the plans and testimony that

³ Section 117 A of the Zoning Ordinance states that, unless the Board rules otherwise, special exceptions and variances shall expire in six months if the landowner does not obtain a building permit within that time. Code §155-117 A.

⁴ Section 95 AA(4) allows the Board to waive up to 50% of required parking spaces for educational uses in the applicant demonstrates that they are not necessary for the use. Code §155-95 AA(4).

the Appellant presented at the hearings. [*Id.* at p. 15] The Board also conditioned the grant of relief on the Appellant's re-stripping a parking lot and reserving 78 additional parking spaces for future construction if the Zoning Officer were to determine during the ten years following the Appellant taking possession of the property that the spaces are needed. [*Id.*]

A number of neighbors appealed the decision in *St. Joseph's I* to the Court of Common Pleas of Montgomery County. *Asher, et al. v. St. Joseph's University*, No. 2006-08888. The parties resolved that appeal with a written stipulation and settlement agreement dated July 27, 2006.

On April 18, 2008, the Appellant filed an application with the Township for tentative sketch plan approval of certain improvements to the playing fields on the Maguire Campus. The Board of Commissioners ("BOC") approved the plan on May 7, 2008 and the Appellant subsequently filed an application for preliminary plan approval. The plan generally calls for: (1) combining two fields bordering Latches Lane into one larger, below-grade baseball field, adding bleachers, dugouts, a press box, 35-foot high netting, and a permanent public address system, (2) converting the existing football field into a softball field, adding bleachers, dugouts and a press box, (3) converting two fields bordering City Avenue into a hockey field and an intramural field, adding bleachers, (4) installing artificial turf on the baseball, softball and hockey fields, and (5) installing a retaining wall, stairs and ramps for the below-grade baseball field.

While the preliminary plan was pending before the BOC, a group of neighbors known as the Merion Community Coalition ("MCC") wrote to the Zoning Officer objecting to the preliminary plan, claiming that the proposed improvements to the playing

fields amounted to an "expanded use" beyond that described in the plans and testimony at the hearings on *St. Joseph's I*. MCC further claimed that the Appellant had to return to this Board for a special exception for the expanded use. *See*, Code §155-11 X. After receiving additional correspondence from the Appellant and the MCC, the Zoning Officer issued a determination that the following items were "expanded uses" that required a special exception from the Board: (1) the press box, dugouts, bleachers and public address system for the baseball field, (2) the press box, dugouts and bleachers for the softball field, and (3) the bleachers for the hockey field.

The Appellant and the MCC filed appeals with the Board from the Zoning Officer's decision.⁵ The Board held a hearing on both appeals on December 8, 2008. The parties agreed to incorporate the record in each of their appeals and to also incorporate the record in *St. Joseph's I*. [N.T. 16-19]⁶ The Appellant then presented the testimony of Dennis Glackin, an expert land planner who had also testified for the Appellant in support of the special exception request in *St. Joseph's I*. Mr. Glackin stated that, in his opinion, all of the improvements presently proposed for the playing fields on the Maguire Campus are "manifestations of the use" that the Board approved in *St. Joseph's I*. [N.T. 42]

Following Mr. Glackin's testimony, the Board opened the record on MCC's appeal. [N.T. 93] MCC's only witness was Charles Guttenplan, whom the Board also

⁵ The MCC appeal is docketed with the Board at No. 4167. The parties did not agree to consolidate the appeals, so the Board has entered a separate decision in Appeal No. 4167. In addition, the Appellant originally requested, in the alternative, that the Board grant a special exception for the improvements shown on its preliminary plan. That request was withdrawn.

⁶ References in this decision to "N.T." with no date designation are to the testimony at the December 8, 2008 hearing on the present appeal. References with a date designation are to the testimony at the three hearing dates in *St. Joseph's I*. The Appellant introduced those notes of testimony in full in this matter as Exhibit A-5.

accepted as an expert in land planning. Mr. Guttenplan prepared a memorandum listing 13 differences between the plan approved in *St. Joseph's I* and the Appellant's proposed preliminary development plan. He stated that, except for the items referring to the removal of buildings, the items on the memorandum are "expanded uses" from the original approval. [N.T. 100-101]⁷

At the conclusion of Mr. Guttenplan's testimony, the parties agreed on a schedule for submitting briefs and agreed to waive the 45-day period within which the Board was required to render a decision. [N.T. 121-126]

After reviewing all the records and the parties' briefs, the Board denies the Appellant's appeal.

The Lower Merion Zoning Ordinance provides that uses allowed by special exception or conditional use in a residential district can only be expanded in a like manner. Code §155-11 X. Thus, an accredited educational institution such as St. Joseph's University must obtain a special exception if it proposes an "expanded use" of its property. Code §155- 11 S(2) (permitting accredited educational institution by special exception). The Zoning Ordinance defines "expanded use" as:

The enlargement of the use of property evidenced by any of the following: the construction of or addition to a building, a parking lot or outdoor recreation structure or equipment; the construction of a new athletic field, a new playground or a new hard-surfaced area designed or intended to be used for sporting or other physical recreation activities; the extension of the use of property beyond the permitted parameters established by the Zoning Hearing Board, or beyond those parameters established in the record of testimony presented to the Zoning Hearing Board in

⁷ Mr. Guttenplan's memorandum was attached as "Exhibit G" to MCC's written appeal in No. 4167, but was not assigned an exhibit designation during the hearing on December 8 in that appeal. MCC's written appeal appears as Exhibit A-7 in this appeal, but Exhibit G to the appeal was not included. The Board considers Mr. Guttenplan's memorandum to be part of the record in both appeals.

support of an approved application; an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population associated with the use as it was authorized by a previously granted special exception or, if not so authorized, as it had been historically used; an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population of driving age associated with the use as it was authorized or, if unauthorized, as it historically experienced; or a change in the days or hours of normal operation.

Code §155-4 B ("Expanded Use").

The Appellant essentially claims that this definition requires the Board to determine only whether the proposed improvements constitute an enlargement of the use, i.e., that the "following" list of circumstances merely illustrates conditions that might be deemed expanded uses if the Board were to otherwise find that the existing use (in this case the use approved in *St. Joseph's I*) is being enlarged. [N.T. 62-63] So for example, in the Appellant's view, the Board's 2006 approval of the use of Episcopal's playing fields for use by St. Joseph's University implicitly included approval of those things that are "necessary to accommodate" an intercollegiate baseball field – including dugouts, bleachers, public address systems and press boxes. [N.T. 53]

MCC, on the other hand, argues in opposition to the Appellant's appeal that the definition of "expanded use" should be read more restrictively, i.e. that the "following" language contains a list of circumstances that must themselves be deemed "expanded uses." [N.T. 103-104] So the construction of a new baseball field, in MCC's view, is by definition an expanded use.

After reviewing the record in *St. Joseph's I*, the Board finds that, even under the Appellant's interpretation of "expanded use," the items listed in the Zoning Officer's

September 16, 2008 letter represent an "enlargement of the use" of the Maguire Campus from the use that the Board approved in *St. Joseph's I*.

A review of the record in *St. Joseph's I* reveals that the focus of the Appellant, the witnesses and the objectors during the hearings was primarily on the effects that the use of the Maguire Campus by college students would have on traffic and parking. [See, N.T. 10/27/05 at 58-70, 77-89; N.T. 12/1/05 at 11-54; and N.T. 1/26/06 at 12-39] Insofar as the Appellant addressed the uses to which the Campus would be put, its witnesses testified that the use of the playing fields would be the same as that being made by Episcopal Academy, except for the age of the students. [N.T. 10/27/05 at 45, 49-50] Appellant's Counsel also stated that the existing and proposed uses would be the same. [N.T. 10/27/05 at 9] In addition, every witness testified unequivocally (and Appellant's counsel agreed) that there would be no construction whatsoever on the Maguire Campus in connection with the proposed use:

Mr. Sklaroff [Appellant's Counsel]: This is a very complicated – let me say this. The proposal is very straightforward. There is no construction. The existing use is going to be – is the same as the proposed use.

* * *

Mr. Sklaroff: Dr. Wachterhauser [University Provost], is any new construction planned for this site?

A: No.

* * *

Mr. Glackin [Appellant's land planner]: As we said earlier, there is no proposed construction here, so the impervious coverage limits which are in the same section of 155-11 really would not apply to this application.

* * *

Mr. Sklaroff: [...] I'm going to ask you whether – is it a fact that no new building is currently proposed; correct?

Mr. Glackin: Correct.

* * *

Mr. Sklaroff: Based on all your testimony, your analysis of the documents, the university's proposal, do you have an opinion as to whether the university's proposed use is consistent with the public health, welfare and safety?

Mr. Glackin: I believe it is consistent for several reasons. One has to do with the traffic and the fact that the traffic will actually be lessened which you will hear about in a few minutes. There are no proposed changes to the drainage, the air quality because there are no physical changes being proposed here. [...]

[N.T. 10/27/05 at 9, 39, 55, 58, 63; emphasis supplied]

Accordingly, the Board granted a special exception allowing the Appellant's use of the Maguire Campus and its athletic fields for substantially the same use as that made by Episcopal, with no new building or construction. [*See, esp.*, Exhibit A-4 (Board Opinion), p.15 ¶5]

The Board finds that the new plans and testimony presented at the hearing in this matter on December 8, 2008 clearly evidence an "expanded use" beyond the one permitted by the Board in *St. Joseph's I*. [*Compare* Exhibit A-3 and Exhibit A-6] The baseball field and softball field are new and are substantially larger than the fields Episcopal had used in those locations. Both are proposed to be improved with artificial turf, dugouts, bleachers and press boxes. The Appellant also proposes to erect 35-foot high netting and retaining wall along the Latches Lane side of the baseball field and to install a permanent public address system for that field. The field hockey field will also

be improved with artificial turf. All of these improvements involve construction of "structures" or "buildings" under Lower Merion ordinances. [N.T. 45-46, 54-56, 73, 84-85]

None of these improvements were before the Board in *St. Joseph's I* and they were not what the Board approved. Rather, they represent an "enlargement of the use" that the Board approved. The Appellant is, therefore, required to obtain a special exception to expand that use. Code §§155-4 B ("Expanded Use"), 155-11 X. Because the Zoning Officer's letter of September 16, 2008 includes the press boxes, dugouts, bleachers and the public address system, the Appellant's appeal from that letter will be denied.

Appellant nevertheless argues that the mention of "varsity" athletics by one of its witnesses in the hearings on *St. Joseph's I* entitles it to proceed with its planned construction activities without further Board approval. All the planned improvements, according to the Appellant, are simply "necessary to accommodate" varsity athletics – and the Board and the objectors should have realized this when the Appellant proposed to have varsity athletics on the Maguire Campus. There are several problems with that argument.

First, it contradicts the unequivocal testimony of every witness for the Appellant in *St. Joseph's I* that no construction – indeed no physical change whatsoever – was being proposed for the Maguire Campus. The use of the fields was represented to be the same as the use that Episcopal made of those fields, except for the age of the participants. That is the use for which the Board granted a special exception. [*See, esp.*, Exhibit A-4 (Board Opinion), p.15 ¶5]

Second, the term "varsity" was mentioned just two times during the three nights of hearings. Dr. Wachterhauser, University Provost, described the proposed uses of the various buildings and playing fields. He stated:

Eight [site number 8 on a plan of the property] is the squash court. We currently don't have a squash court or varsity squash or anything like that. We think it's really only suitable for a squash court, so it will stay a squash court.

* * *

The playing fields, twenty [i.e. site number 20 on a plan of the property] up here. How we plan to use these fields, basically the sports that prefer grass, would move over and be dependent on these fields. Varsity baseball, softball, men's and women's soccer primarily. They would be on all – on all of these fields. Some intramural use as well, as it fit [sic] in to the athletic practice and game schedule. ... We'd also plan to use the tennis courts which aren't numbered as tennis courts. We currently can't have an NCAA Division One tennis match on our campus. This would enable us to do that because it has the requisite number – requisite minimum number of courts.

[N.T. 10/27/05 at 35, 38-39]

Significantly, the very next question to Dr. Wachterhauser was:

Q [Mr. Sklaroff]: Dr. Wachterhauser, is any new construction planned for this site?

A: No.

[N.T. 10/27/05 at 39]

Thus if any inference was to be drawn from the use of the term "varsity," the inference was that the use of the Maguire Campus for varsity sports would not require any new construction.

Third, and concomitantly, there is nothing in the present record or the record in *St. Joseph's I* that would support an inference that the proposed improvements are a

necessary part of varsity sports. [N.T. 108]⁸ No one testified regarding any NCAA rules or regulations that might require dugouts, press boxes, public address systems, artificial turf, etc. Indeed, if these improvements are required for varsity sports, why did every one of Appellant's witnesses unequivocally testify that no new building or construction was planned for Appellant's varsity sports?

The Board believes that it is incumbent on a special exception applicant to provide enough detail about their project to put the community on notice of the use and to enable the Board to determine whether the project adversely affects the public health, safety and welfare. The failure of an applicant to be specific regarding its proposed use does not imply that any future use is permitted that was not part of the applicant's plans and testimony. There are no "stealth" special exceptions. The only "manifestation" or "necessary part of" an approved special exception is what is contained in the plans and testimony.

Further, under the Lower Merion Zoning Ordinance, the applicant for a special exception bears the burden of presenting evidence on specific health and safety issues such as drainage, noise, air quality, property values and neighborhood aesthetics when the Board requests that evidence or when objectors put those factors in issue. Code §155-114. If an applicant's plans and testimony indicate no physical changes whatsoever to an existing property, the Board (and objectors) are not as likely to request evidence on those health and safety issues as they would be if it were known that a permanent public address system, 35-foot high netting, press boxes, dugouts and three separate artificial

⁸ Varsity college athletics do not necessarily even require NCAA regulation-sized fields. The Board recently granted a special exception to Bryn Mawr College to expand the size of one of its soccer/lacrosse fields to meet NCAA standards. Bryn Mawr has been using that undersized field for practice and for competitions for years. *Bryn Mawr College Appeal*, No. 4157 (December 8, 2008).

turf fields were being proposed. In fact, Mr. Glackin testified in *St. Joseph's I* that the plan for the use of the Maguire Campus satisfied the health and safety criteria because no construction and no physical changes were proposed. [N.T. 10/27/05 at 63] He would certainly have had to address how the proposed new structures, artificial turf, retaining walls, and public address systems impact drainage, noise, and neighborhood aesthetics had the Appellant's plan for those improvements been revealed in *St. Joseph's I*. See, Code §§155-114 A(2) and C(1).

This decision does not, as Appellant suggests it might, require that plans for special exception uses be as detailed as those for land development. The Board recognizes that a special exception applicant may not have developed plans to the level of detail required for land development approval. Nevertheless, the plans and testimony submitted in support of a special exception application must be sufficiently specific to enable the Board to determine whether the proposed use meets the specific criteria applicable to the use, including the specific health, safety and welfare criteria discussed above. *Elizabethtown/Mt. Joy Associates, LP v. Mt. Joy Township Zoning Hearing Board*, 934 A.2d 759 (Pa. Cmwlth. 2007); Code §§155-114 A, C and E. The fact that some of the Board's bailiwick in dealing with the public health, safety and welfare encompasses issues that may also be dealt with in land development does not diminish the Board's responsibility to address those issues at a public hearing.

ORDER

AND NOW, this 26th day of March, 2009, it is hereby ORDERED that the appeal of St. Joseph's University from the September 16, 2008 determination of the Lower Merion Zoning Officer is DENIED for the reasons set forth in the foregoing opinion.

Chairman Aaron and Member Fox participating, both voting "aye." Member Brier participated in the hearing but did not vote on the decision in this matter.

Attest: _____
Michael Wylie
Secretary